Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
The Atlanta Channel, Inc.	)	Facility ID No. 65409
	)	
Certificate of Eligibility for Class A Television Status for Low Power Television Station WTHC-LP, Atlanta, Georgia	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 2, 2012 **Released: November 9, 2012**

By the Commission: Commissioners McDowell and Pai issuing separate statements.

1. The Commission has before it for consideration an Application for Review[1] filed by The Atlanta Channel, Inc. ("ACI"), seeking review of a letter decision denying a petition for reconsideration of the Commission's dismissal of its Statement of Eligibility for Class A Television Status.[2] ACI's Statement of Eligibility for Class A Television Status was dismissed by Public Notice dated June 9, 2000.[3] For the following reasons, we deny the Application for Review.

2. **BACKGROUND.** On November 29, 1999, The Community Broadcasters Protection Act of 1999 (CBPA) was signed into law.[4] Under the CBPA, licensees that intended to seek Class A designation were required to submit a certification of eligibility within 60 days after the date of enactment of the Act, *i.e.*, January 28, 2000, certifying compliance with the qualification requirements for Class A stations.[5] Pursuant to the CBPA, an LPTV station submitting a certification of eligibility may qualify for Class A status if, during the 90 days preceding the date of enactment of the statute: (1) the station broadcast a minimum of 18 hours per day; (2) the station broadcast an average of at least 3 hours per week of programming produced within the market area served by the station or the market area served by a group of commonly controlled low power stations that carry common local programming produced within the market area served by such group; and (3) the station was in compliance with the

[1] The Atlanta Channel, Inc., Application for Review (filed December 20, 2000).

[2] Letter from Barbara A. Kreisman, Esq., Chief, Video Division, to The Atlanta Channel, Inc., 1800E3-JLB (November 20, 2000) (*Reconsideration Decision*). Copies of the unpublished letter decision are available in the Commission's public reference room.

[3] *Dismissal of LPTV Licensee Certificates of Eligibility for Class A Television Station Status*, Public Notice, 15 FCC Rcd 9761 (MMB 2000).

[4] Pub. L. No. 106-113, § 5008, 113 Stat. Appendix I at pp. 1501A-594-1501A-598 (1999), *codified at* 47 U.S.C. § 336(f).

[5] 47 U.S.C. § 336(f)(1)(B) ("Within 60 days after November 29, 1999, licensees intending to seek class A designation shall submit to the Commission a certification of eligibility based on the qualification requirements of this subsection.").

Commission's requirements for LPTV stations.[6] The CBPA provides that, "[a]bsent a material deficiency in a licensee's certification of eligibility, the Commission shall grant [a] certification of eligibility to apply for Class A status."[7] Following approval of its certification of eligibility, an LPTV station seeking a change to Class A status must file an application for a Class A license.

3. ACI filed a signed Statement of Eligibility on December 29, 1999, but failed to certify compliance with any of the qualification requirements. Consequently, staff dismissed its Statement of Eligibility as materially deficient. In its Petition for Reconsideration, ACI filed an amended Statement, and argued that the failure to respond to any of the qualification requirements in the original Statement was due to a clerical error.[8] ACI asserted that the Commission should have given ACI an opportunity to cure what it termed a "minor defect," citing the Commission's policy of returning patently defective or incomplete AM and FM applications at the time of tender to give applicants an opportunity to correct and resubmit them.[9]

4. In denying the petition for reconsideration, the staff noted that the amended statement was filed after the statutory deadline, that the Commission does not have general authority to waive or extend the deadline, absent extraordinary circumstances, and that ACI had failed to demonstrate "extraordinary circumstances" justifying waiver of the deadline.[10] The staff rejected ACI's attempt to justify an opportunity for cure based on the Commission's policy on patently defective or incomplete AM and FM construction permit applications. The staff concluded that the construction permit policy does not apply to Class A certifications and, in any event, would not support the result ACI seeks because that policy does not allow a construction permit applicant to remedy an omission by re-submitting its application after the applicable deadline.[11]

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[6] 47 U.S.C. § 336(f)(2)(A). The statute also establishes continuing compliance with the operating rules applicable to full-power stations as a qualification for Class A status. *Id,* § 336(f)(2)(A)(ii) (station must be in compliance with full-power operating rules "from and after" the date of its Class A application). In the alternative to the specified qualification criteria, the Commission may determine that a station qualifies for Class A status if the Commission "determines that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission"). 47 U.S.C. § 336(f)(2)(B). The Commission did not establish any alternative qualification criteria. *See Establishment of Class A Television Service*, Report and Order, 15 FCC Rcd 6355, 6369-70 (2000) (*Class A Order*) (stating that Commission would not adopt alternative criteria but would explore in a separate proceeding whether to establish criteria to allow translator stations to apply for Class A status).

[7] 47 U.S.C. § 336(f)(1)(B). *See also Class A Order*, 15 FCC Rcd at 6360.

[8] ACI did not state that it has met the continuing eligibility requirements for Class A stations since dismissal of its first Statement of Eligibility. For instance, our records show that it has not filed FCC Form 398 Children's Programming Reports, and there is no main studio of record.

[9] Petition for Reconsideration at 2-3 (citing *Commission Statement of Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, 56 Rad. Reg. 2d 776 (P&F) (1984) (*Construction Permit Policy*).

[10] *Reconsideration Decision* at 2 (citing *Class A Order*, 15 FCC Rcd at 6361; *Reuters Ltd. v. FCC*, 781 F.2d 946 (D.C. Cir. 1986); *Gardner v. FCC*, 530 F.2d 1086, 1091-92 (D.C. Cir. 1976)).

[11] *Id.* at 2 (citing *Construction Permit Policy*, 56 Rad. Reg. 2d (P&F) at 777).

5. In its Application for Review, ACI argues that untimeliness is not an appropriate grounds for dismissal of its corrected Statement of Eligibility.[12] ACI attempts to distinguish the cases the Commission cited in support of its dismissal, claiming that in those cases, the applicant had not submitted anything prior to the applicable deadline, whereas ACI submitted its admittedly incomplete Statement of Eligibility before the deadline.[13] ACI maintains that its defective submission was timely and was not materially deficient because, even though it failed to certify compliance with any of the qualification requirements, the station had nevertheless met all the programming and technical requirements set forth in the CBPA.[14] Citing congressional findings in the CBPA, ACI asserts that the statutory phrase "material deficiency" means that "the licensee *cannot* certify full compliance with the eligibility criteria" because Congress sought to "maximize, not restrict the conferral of Class A status on deserving low power licensees" and determined that "licenses that have complied in all respects with the qualifying criteria set out in § 336(f)(2)(A) [should be afforded] the valuable protection assured to Class A operations."[15] ACI also claims the staff erred in analogizing the current situation with AM and FM construction permit applications resubmitted after the Commission's cut-off deadlines.[16] Characterizing staff's dismissal of its Statements of Eligibility as "draconian" and unduly harsh, ACI states that *nunc pro tunc* acceptance of its corrected filing "would be entirely consistent with notions of fairness" and would not affect other LPTV licensees who filed timely certifications.[17] Finally, ACI claims it will suffer irreparable injury, and viewers will experience reduced service, if its Statement of Eligibility is not reinstated.[18]

6. **DISCUSSION.** The CBPA was designed to permit a one-time conversion of a single pool of LPTV licenses where licensees (1) met specific criteria before the statute was enacted, and (2) filed a "certification of eligibility," on or before the statutory deadline, establishing that they met these criteria. As the Commission stated in implementing the Class A service, the CBPA intended to provide LPTV stations "a window of opportunity to convert to Class A stations,"[19] not an ongoing right to alter status from LPTV to Class A. Consequently, the Commission determined that it would not "accept applications from LPTV stations that did not meet the statutory criteria *and* that did not file a certification of eligibility by the statutory deadline, absent compelling circumstances."[20]

7. Staff's dismissal of ACI's original, timely-filed Statement of Eligibility was within the Commission's authority under the CBPA, which requires the Commission to grant eligibility upon a licensee's submission of the required certifications, "absent a material deficiency." ACI's failure to

[12] Application for Review at 2-4.

[13] Application for Review at 2 n.4.

[14] Application for Review at 3.

[15] Application for Review at 3 (citing *Congressional Findings Respecting Low-Power Television*, Pub. L. No. 106-113, Div. B., § 1000(a)(9) [S. 1948, Title V, § 5008(b)], Nov. 29, 1999, 113 Stat. 1536, 1537) (emphasis in original).

[16] Application for Review at 4-6.

[17] Application for Review at 4-6.

[18] Application for Review at 6.

[19] *Class A Order*, 15 FCC Rcd at 6361.

[20] *Id.* (emphasis added).

include the required certifications in its Statement of Eligibility was a "material deficiency," and staff was entitled to dismiss the filing on that basis.

8. We disagree with ACI's overly restrictive interpretation of the term "material deficiency" to exclude filings, such as its original Statement of Eligibility, that omit all of the required certifications so long as the licensee actually met the CBPA's qualification requirements. Congress did not define the term "material deficiency," so we must determine whether staff's action was based on a reasonable interpretation of that phrase.[21] Based on the plain language of the statute, we think it is reasonable to interpret the phrase to include the complete omission of the required certifications, regardless of whether the licensee actually met the statutory qualifications at the time of filing. In seeking to ensure that licensees that met the qualifications would have an opportunity to obtain Class A status, Congress chose a specific mechanism for establishing eligibility – certification. Licensees seeking Class A status must "submit . . . a *certification* of eligibility based on the qualification requirements of this subsection."[22] ACI's interpretation would read the word "certification" out of the statute completely. Our interpretation is supported by the structure of the statute, which requires the Commission to grant certifications of eligibility absent a material deficiency. Congress implicitly determined that a station's submission of each of the required certifications constitutes a sufficient showing of eligibility, rendering the Commission's exercise discretion unnecessary. Under ACI's interpretation, the Commission would be required to grant Statements of Eligibility that lack any evidence whatsoever of the station's qualifications. ACI claims erroneously that the CBPA's findings section states that "licenses that have complied in all respects with the qualifying criteria" should be afforded Class A status.[23] We find no such language there. Our interpretation is consistent with the purpose and history of the statute, which indicate that Congress sought to confer Class A status only on those licensees that could show that they met specific qualifications.[24]

9. Staff's dismissal of ACI's untimely submission of the required certifications five months after the statutory deadline was also appropriate. The deadline established in the CBPA is non-discretionary--"*Within 60 days after November 29, 1999*, licensees intending to seek class A designation *shall submit* to the Commission a certification of eligibility based on the qualification requirements of

[21] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[22] 47 U.S.C. § 336(f)(1)(B) (emphasis added).

[23] Application for Review at 3 (citing *Congressional Findings Respecting Low-Power Television*, Pub. L. No. 106-113, Div. B., § 1000(a)(9) [S. 1948, Title V, § 5008(b)], Nov. 29, 1999, 113 Stat. 1536, 1537).

[24] *See* Pub. L. No. 106-113, § 5008(b)(1)-(2), 113 Stat. Appendix I at pp. 1501A-594 through -598 (1999), *Findings Respecting Low-Power Television* (stating that "a small number" of LPTV licensees have operated their stations consistent with the requirements applicable to full-power broadcasters and have provided valuable service to their communities); H.R. REP. NO. 106- 464 (1999) (Conf. Rep.), 1999 WL 1095089 (Leg. Hist.) at 105 ("[T]he conferees seek to buttress the commercial viability of those LPTV stations *which can demonstrate* that they provide valuable programming to their communities.") (emphasis added). The Conference Report does not discuss the term "material deficiency." *See id.*; H.R. REP. NO. 106- 479 (1999) (Conf. Rep.), 1999 WL 1127671 (Leg. Hist.). A Senate Committee Report on earlier legislation with nearly identical language explains that the phrase is intended to mean "an application that is not substantially complete and does not contain the basic supporting information to document the applicant's claim for eligibility or the station's compliance with the requirements of Part 73." S. REP. NO. 105-411 (1998), 1998 WL 713444 (Leg. Hist.) at 4.

this subsection."[25] Courts have held that, absent compelling circumstances, the Commission lacks discretion to accept late-filed petitions for reconsideration, which are subject to a similarly mandatory statutory deadline.[26] Although ACI claims that considerations of fairness and hardship require the Commission to accept its late-filed certifications, these factors are not sufficient to warrant equitable tolling of the deadline, which requires a showing that the party seeking such relief was unable to meet the deadline due to extraordinary circumstances despite the exercise of due diligence.[27] ACI has not shown that extraordinary circumstances prevented it from meeting the deadline or that it exercised due diligence. As ACI admits, it filed a Statement of Eligibility that failed to assert compliance with any of the qualification requirements set forth in the CBPA, and it attributes this failure to clerical error. Having filed its defective Statement one month before the deadline, ACI had ample time to review the filing and take the necessary corrective action before the deadline expired. It offers no reason for its failure to do so, and in fact it made no effort to correct the defect until five months after the deadline, when staff dismissed its original Statement of Eligibility. Staff's dismissal of the corrected Statement of Eligibility was consistent with the Commission's policy in analogous circumstances involving statutory deadlines[28] and with the Commission's approach to the Class A licensing process specifically.[29] ACI's characterization of staff's action as unduly harsh is not surprising. Deadlines often have harsh

[25] 47 U.S.C. § 336(f)(1)(B) (emphasis added). Congress did not give the Commission the discretion to establish an alternative deadline or excuse a licensee's failure to meet the deadline.

[26] *See Reuters, Ltd. v. FCC,* 781 F.2d 946 (D.C. Cir. 1986) (express statutory limitations barred the Commission from acting on a petition for reconsideration that was filed after the due date); 47 U.S.C. § 405(a) ("A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of."). *See also Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 964 (7th Cir. 2005) (Forest service lacked discretion to excuse a party's failure to appeal the agency's action within the statutory period).

[27] *Bensman v. U.S. Forest Serv.*, *supra,* 408 F.3d at 964 ("Equitable tolling is . . . reserved for those situations in which extraordinary circumstances prevent a party from filing on time. It applies only to cases in which circumstances prevent a litigant from filing despite the exercise of due diligence, regardless of the defendant's conduct.") (citations omitted); *Communications Vending Corp. of Arizona, Inc. v. FCC*, 365 F.3d 1064, 1075 (D.C. Cir. 2004) (D. C. Circuit has "set a high hurdle for equitable tolling, allowing a statute to be tolled 'only in extraordinary and carefully circumscribed instances.' . . . [E]quitable tolling is unwarranted where a litigant has 'failed to exercise due diligence in preserving his legal rights.'") (citations omitted); *see also Nguyen v. U.S. Sec'y of Agric.*, 31 C.I.T. 1438, 1441 (2007) (where plaintiff filed a timely but defective application and later re-filed a complete but untimely application, "[t]he 'critical inquiry' is plaintiff's diligence"); *Bull S.A. v. Comer*, 55 F.3d 678, 681 (D.C. Cir. 1995).

[28] *See 21st Century Telesis Joint Venture v. FCC,* 318 F.3d 192 (D.C. Cir. 2003) (affirming the Commission's decision not to exercise its discretion to hear late-filed supplements when the petitioner offered no plausible explanation as to why supplemental arguments were not made in its initial petition); *Virgin Islands Telephone Corporation v. FCC,* 989 F.2d 1231 (D.C. Cir. 1992) (upholding the Commission's refusal to entertain a petition for reconsideration where the petition had been filed one day late and extenuating circumstances did not prohibit the petitioner from filing within the prescribed time limits); *Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension & Reauthorization Act of 2004*, 21 FCC Rcd 4813, 4826 (2006) (denying untimely requests for waiver of digital television testing requirements because "[i]t is well-settled that the Commission lacks authority to extend statutory filing deadlines.").

[29] *See Class A Order*, 15 FCC Rcd at 6361 (absent compelling circumstances, Commission would not accept Class A applications from LPTV licensees that did not meet the statutory criteria and file a certification of eligibility by the statutory deadline).

consequences for those who fail to meet them.[30] As staff correctly concluded, ACI has not shown that extraordinary circumstances warrant the Commission's acceptance of its late-filed certifications.[31] Accordingly, we lack discretion to excuse ACI's belated attempt to cure the material defects in its original Statement of Eligibility.[32]

10. Upon review of the Application for Review and the entire record, we conclude that ACI has failed to demonstrate that the staff erred. The staff properly dismissed ACI's original and corrected Statements of Eligibility, and we uphold its decision for the reasons stated herein.

11. **ACCORDINGLY, IT IS ORDERED** that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[30] *United States v. Locke*, 471 U.S. 84 (1985) ("Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced.").

[31] *See Reconsideration Decision* at 2; *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990) (failure to timely appeal agency action by the statutory deadline because of lawyer's absence from the office when agency issued notice of its action was "at best a garden variety claim of excusable neglect"); *Virgin Islands Telephone, supra,* 989 F.2d at 1237 (miscommunication within law firm did not present extenuating circumstances warranting acceptance of late-filed petition for reconsideration).

[32] In reaching this conclusion, we do not rely on the Commission's policy regarding AM and FM construction permits. Further, ACI is incorrect in asserting that staff did so. In fact, staff rejected ACI's argument that staff should have followed the construction policy by permitting ACI to cure its defective Statement after the deadline had passed, explaining why the policy would not justify acceptance of ACI's corrected filing even if it were applicable. *See Reconsideration Decision* at 2; Petition for Reconsideration at 2-3 ("It is longstanding Commission policy to return defective or incomplete AM and FM applications at the time of tender to give applicants an opportunity for correction and resubmission . . . . The same opportunity to cure a minor defect should be afforded to ACI in this situation.").

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: Certificate of Eligibility for Class A Television Status for Low Power Television Station WTHC-LP, Atlanta, Georgia

I vote to approve the substance of this order upholding a Media Bureau decision to dismiss the certificate of eligibility, filed by The Atlanta Channel, Inc., required to obtain Class A television station status.[1] I am disappointed, however, by the Commission's handling of this matter. Our decision finally resolves an application for review that was filed on December 20, 2000. This licensee has now waited almost twelve years for the completion of this FCC proceeding. Such bureaucratic lethargy causes uncertainty, impedes investment, and hinders innovation and economic growth. As a matter of good government, the Commission must process all cases as quickly as possible. Twelve years of inaction is not justifiable. The American people deserve better.

[1] The Atlanta Channel, the licensee of lower power television station WTHC-LP, failed to timely certify compliance with the initial eligibility requirements needed to obtain a Class A designation, as mandated by the Community Broadcasters Protection Act of 1999. 47 U.S.C. § 336(f)(1)(B).

STATEMENT OF
COMMISSIONER AJIT PAI

Re: Certificate of Eligibility for Class A Television Status for Low Power Television Station WTHC-LP, Atlanta, Georgia

Today's decision highlights the need for the Commission to establish a firm deadline for acting on applications for review and to consider other procedures in order to speed up the disposition of Commission-level items.[1] It should not have taken *almost twelve years* to issue this eleven-paragraph item. The delay is especially ironic given that our decision rests on the Atlanta Channel's failure to file a complete certificate of eligibility for Class A status in a timely fashion (i.e., not until approximately *five months* after the deadline).

[1] For instance, I would support the use of a procedure akin to the *certiorari* process used by the U.S. Supreme Court to manage its docket. Under the Communications Act and our rules, a party aggrieved by a Bureau-level decision on delegated authority may file an application for review with the full Commission. 47 U.S.C. § 5(c)(4); 47 C.F.R. § 1.115(a). In order to prevent such applications (like the instant one) from slipping through the cracks, we could modify our rules to provide that if the full Commission does not act on an application for review within a certain period of time – say, 90 days – the full Commission would automatically affirm the Bureau's decision and would adopt the Bureau's reasoning as its own. Within the 90-day period, any one Commissioner could object to summary affirmance and could request the normal treatment of such an application by the full Commission. Under the Administrative Procedure Act, we could implement this rule change without notice and comment. *See* 5 U.S.C. § 553(b)(A) (procedures do not apply to "rules of agency organization, procedure, or practice"). Moreover, this rule change would be consistent with the Communications Act. *See* 5 U.S.C. §§ 5(c)(4) (Commission may review applications for review "in such manner as it shall determine"); 5(c)(5) (Commission may pass upon applications for review "without specifying any reasons therefore"). This reform could significantly improve agency efficiency; given our limited resources, the full Commission simply cannot conduct a near-plenary review of every application for review in a prompt manner.